88-1069

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ALFREDO LUNA REGALADO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Is application of 31 U.S.C. Section 5316 to a personal check reflecting on its face that the check is overdue and of impaired negotiability contrary to the statutory purpose of tracking cash and cash equivalents for which 31 U.S.C. Section 5316 was enacted?

2. Does 31 C.F.R. Section 103.11(k) depart from the legislative purpose for which authority was delegated to define monetary instruments for reporting purposes insofar as it includes a personal check in which the payor designation is left blank where the negotiability of the check is impaired as a matter of State Law?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Alfredo Regalado Luna[1] petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit on this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is not reported. It appears as Attachment A. The Order denying Petitioner's Motion For Rehearing appears as Attachment B. The Opinion and Judgment of the District Court is not reported. It appears as Attachment C.

1. The parties in the Court below were Alfredo Regalado Luna as Appellant-Defendant and the United States as Appellee-Plaintiff.

JURISDICTION

The decision of the Court of Appeals affirming Petitioner's conviction was entered August 30, 1988. Petitioner's Motion For Rehearing was denied October 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1259(1).

STATUTORY PROVISIONS INVOLVED

Section 5316 of Title 31 of the United States Code provides in relevant part:

> ". . . [A] person . . . shall file a report under subsection (b) of this section when the person . . . knowingly—(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time
>
> . . .
>
> (B) to a place in the United States from or through a place outside the United States . . .

31 U.S.C. Section 5316.

Section 5312 of Title 31 of the United States Code provides in relevant part:

> (3) " '[M]onetary instruments' means—(A) United States coins and currency; and
>
> (B) as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material."

31 U.S.C. Section 5312.

STATEMENT

Petitioner was indicted for transporting monetary instruments in excess of $10,000 across the United States/Mexico Border without filing a Currency and Monetary Report in violation of 31 U.S.C. Section 5316(a). The indictment charged that on or about July 1, 1987, Petitioner transported U. S. Currency and a bearer form check in the approximate amount of $11,245.00. Petitioner had $8,715 in currency and a personal check dated April 29, 1987, drawn on the account of Becky Benavides for $2,530.

The undisputed evidence established that the check was worthless from the day it was issued. The check was drawn on the account of Becky Benavides. Mrs. Benavides' bank statements for the period from March, 1987, through October, 1987, showed that the account never had enough money to cover the check. (III ROA 133-141). Further the check was never intended to be cashed. Becky Benavides testified:

> "I had given Mr. Regalado the check until my brother [Nestor Martinez] would have the money to pay him because this check was never intended to be cashed."

(III ROA 144). The check was to be returned to Mrs. Benavides a few days later when her brother paid Petitioner. (III ROA 145).

Sometime before July 1, after Martinez had made good on the bond, Mrs. Benavides called Petitioner to get the check back. Petitioner said "not for me to worry about the check he wasn't going to put it through the bank; that the check was misplaced. He had misplaced the

check. He couldn't find it." (III ROA 147). Mrs. Benavides and Petitioner had an oral agreement that the check would never be used because she would never have the money to cover the check. (III ROA 154).

The evidence that Petitioner and Mrs. Benavides never intended the check to be cashed is undisputed. The evidence that Mrs. Benavides never had the funds available to cover the check is similarly undisputed. The evidence that the condition for return of the check had been fulfilled—Martinez had made good his bond—is undisputed. Finally, the evidence that the check on its face gave notice it was overdue is undisputed.

REASONS FOR GRANTING THE WRIT

The declared purpose of 31 U.S.C. Section 5311 *et seq* is "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. Section 5311. Sections 5311 *et seq* were intended to provide a mechanism for tracking deposit, withdrawal and transportation of large amounts of currency or currency equivalent instruments. *See California Bankers Association v. Schultz,* 416 U.S. 21, 94 S. Ct. 1494 (1974). The statutory focus was on the importance of reports of large and unusual currency transactions in ferreting out criminal activity. *Id.* The act was not intended to interfere with the flow of legitimate commercial transactions. Rather, Congress intended to provide more definite standards for determining the types of unusual financial transactions that should be reported. *California Bankers Assoc. v. Shultz, supra.*

Definite standards for determining the types of *unusual* transactions that should be reported are necessary due

to the fact that Section 5316 and its companion statutes criminalize conduct which one would not ordinarily regard as having a criminal aspect.[2] In Section 5312, Congress delegated authority to define "monetary instrument" for reporting purposes. The authority delegated was limited to reports serving the underlying purpose of the act as a whole—tracking unusual currency movements related to illegal activity. Reporting personal checks of impaired negotiability and no value does not serve the legislative purpose of the reporting requirement. Guidance by this Court on the proper application of the reporting requirement of Section 5311 *et seq* is necessary to ameliorate the potential for harsh and unfair application and to ensure compliance with the legislative purpose of the Act.

Application of Section 5316 to the facts of the instant case does not serve the legislative purpose of tracking unusual currency transactions. Under any realistic appraisal, the check forming the cornerstone of the government's case was not the equivalent of currency and was worthless. The check could not have been honored on demand because there were insufficient funds with which to pay the check. Collection by any party, including a holder in due course if attempted before the check became overdue, would entail litigation which may result in a judgment against a judgment proof defendant.

Further, given the age of the check at the time of the seizure, the check was not a negotiable instrument subject to negotiation on demand by a holder in due course.

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2. The currency reporting requirements set forth in Section 5311 *et seq.* have been given harsh and unfair application by the Courts of Appeals. See *e.g. United States v. $173,081.04 in U.S. Currency,* 835 F.2d 1141 (5th Cir. 1988) [Approving Civil Forfeiture of $173,081.00 for inadvertent reporting error].

In order to be a holder in due course, a holder must take an instrument "without notice that it is overdue." Tex. Bus. & Commerce Code Section 3.302(a)(3). One who is not a holder in due course takes an instrument subject to "all defenses of any party which would be available in an action on a simple contract." Texas Bus. & Commerce Code, Section 3.306. Under Section 3.304, "the purchaser has notice that an instrument is overdue if he has reason to know . . . (3) that he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue. *A reasonable time for a check drawn and payable within the states* and territories of the United States and the District of Columbia *is presumed to be thirty days.*" Texas Bus. & Commerce Code, Section 3.304(c)(3) (emphasis added). In the instant case, the check was more than 60 days old. Anyone taking it would have had notice that it was overdue and therefore subject to all defenses available against enforcement of a contract, a fact that significantly impaired its status as a negotiable instrument. Given the fact that the check was issued only as a show of good faith subject to being returned unnegotiated upon satisfaction of the bond requirements, the check would not have been subject to payment as a matter of law.

With regard to Regalado, any attempt to negotiate the check would have subjected him to liability for breach of contract or fraud. While the Uniform Commercial Code provides that a holder in due course takes free of specified defenses, a party to a transaction remains subject to all defenses. Tex. Bus. & Commerce Code, Section 3.207.

Both legally and factually, Petitioner could not have negotiated the check and obtained payment of the face amount. The overdue nature of the check gave notice of

its impairment as a negotiable instrument to any who saw it, including the customs agents who seized it. A reasonable person in Petitioner's position would not regard the check as having value because it had no value. A fair minded jury could not find beyond a reasonable doubt that the check had sufficient value to justify a conviction in this case.

In this case the age of the check, apparent on the face of the check, is not a subjective fact which would confound the commercial law and render the reporting statute ineffective. Rather, it is an objective factor which, under applicable state law, places one on notice of the existence of defenses to payment of the check and impairs the check's status as a negotiable instrument. Recognition of such an objective factor is fully consistent with the statutory purpose of tracking cash and cash equivalents. To the extent that 31 C.F.R. Section 103.11(k) applies to a personal check in which the payor designation is left blank, it should be construed as restricted to a check where negotiability is not impaired under state law by being overdue or by being irregular on its face. Any other construction would render 31 C.F.R. Section 103.11(k) inconsistent with Congress' intent and, therefore invalid.[3]

Application of Section 5316 to criminalize Petitioner's conduct is an unduly harsh and unfair result. The reporting requirements are designed to track cash and cash equivalents to assist in controlling criminal activity. That purpose is not served by application of Section 5316 to

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3. Regulations promulgated by administrative agencies may not exceed or depart from the legislative purpose for which authority to issue regulations was delegated. *See, Bowen v. America Hosp. Assn.*, ____U.S.____, 106 S. Ct. 2101 (1986).

the facts of this case. In view of the increasing number of prosecutions under Section 5316 *et seq* and the real potential for harsh and fundamentally unfair results including the result in this case if such prosecutions are not limited to situations involving large, *unusual* currency transactions of the type contemplated by Congress, this Court should provide the lower Courts with guidance on the monetary instruments subject to the reporting requirement.

CONCLUSION

For the foregoing reasons, Petitioner asks that the Petition For Writ of Certiorari be granted.

Respectfully submitted,

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Alfredo Regalado Luna

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI were mailed, certified mail, return receipt requested to Mr. Charles Fried, Solicitor General, United States Department of Justice, Washington, DC 20530 on this _____ day of December, 1988.

J. A. CANALES

ATTACHMENT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-6264

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALFREDO LUNA REGALADO,
Defendant-Appellant.

Appeal from the Unied States Distric Court
for the Southern District of Texas
(CR-B-87-295)

(August 30, 1988)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Alfredo Luna Regalado appeals his conviction for knowingly transporting into the United States from Mexico monetary instruments in excess of $10,000.00 without filing a Currency and Monetary Instruments Report in violation of 31 U.S.C. § 5316(a)(1)(B). Finding that the evidence was sufficient to sustain Regalado's conviction and that the trial court correctly instructed the jury on the elements of the crime, we affirm.

I.

Alfredo Luna Regalado was charged in a one count indictment with violating 31 U.S.C. § 5316(a)(1)(B) (1983): knowing transportation into the United States from Mexico of monetary instruments in excess of $10,000.00 without filing a Currency and Monetary Instruments Report, Form CF-4790, while knowing he was required to do so. Regalado was found guilty by a jury and sentenced to three years imprisonment and a $2,000 fine. The facts leading up to his conviction are as follows.

Regalado, a United States citizen, was returning to the United States from Mexico with a passenger in his automobile via the Hidalgo Bridge Port of Entry in Texas. At the primary inspection point, Regalado, a former customs inspector, responded negatively to a customs inspector's question whether he was bringing back any "fruits, liquor, vegetables, or money over $10,000."

At secondary inspection, a Customs inspector asked whether he and his passenger were bringing any fruits, medicines, liquor, avocados, potatoes, or $10,000 or more in cash or checks from Mexico. The inspector explained that a form was required to bring in $10,000 or more.

Regalado again responded negatively. An inspection of the vehicle revealed $6,615 in U.S. currency and a check for $2,530 in bearer form in the glove compartment, and $2,100 in U.S. currency in Regalado's attache case on the back seat. Regalado admitted that the currency belonged to him, but explained that the check had been returned for insufficient funds.

Regalado was arrested and later charged with a violation of 31 U.S.C. § 5316(a)(1)(B). Section 5316 provides in pertinent part:

> "(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—
>
> (1) transports, is about to transport, or has transported monetary instruments of more than $10,000 at one time—
>
> (B) to a place in the United States from or through a place outside the United States. . . ."

31 U.S.C. § 5316(a)(1)(A).

Monetary instruments are defined as:

> (A) United States coins and currency; and
>
> (B) as the Secretary may prescribe by regulation, coins and currency of a foreign county, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material.

31 U.S.C. § 5312(a)(3). Acts constituting criminal violations of this statute must be performed knowingly and willfully. United States v. Salinas-Garza, 803 F.2d 834, 838 (5th Cir. 1986).

In the instant case, there is no issue as to Regalado's knowledge of the reporting requirement: he was a former customs inspector, he passed by a sign setting forth the requirement, and he was informed twice by different customs inspectors about the requirement. However, Regalado disputes the sufficiency of the evidence that he knowingly and willfully violated the Act.

He alleges that the evidence was insufficient in two respects. First, he states that the government failed to prove that he transported "monetary instruments with a value in excess of $10,000." He admits possessing $8,715 in cash but contended at trial that he did not know he had to report the check because: (1) he didn't know it was there; (2) he didn't think it was in bearer form; (3) it was two months old; and (4) it was not intended to be cashed. Rebecca Benavides testified that she issued the check and gave it to Regalado as security for her brother's bail, which he would raise and pay to Regalado after he got out of jail. She stated that the check was not intended to be cashed, and that she did not have the funds in her account to cover the check.

Regalado argues that because "[t]he check had no value," the reporting requirement was not activated. The check is expressly covered by the applicable Treasury regulations which provide that checks which must be reported include:

> "(ii) all negotiable instruments (including *personal checks,* business checks, official bank checks, cashier's checks, third-party checks, promissory notes (as that term is defined in the Uniform Commercial Code), traveler's checks, and money orders) that are either *in bearer form,* endorsed without restriction, made out to a fictitious payee (for the purposes of § 103.23), or otherwise in such form that title thereto passes upon delivery;

> (iii) *Incomplete instruments (including personal checks,* business checks, official bank checks, cashier's checks, third-party checks, promissory checks (as that term is defined in the Uniform Commercial Code), traveler's checks, and money orders) *signed but with the payee's name omitted*:

31 C.F.R. § 103.11(k) ii, iii (1987) (emphasis added).

Whether Regalado's check was a negotiable instrument in bearer form is a question of state commercial law. United States v. Gonzalez-Medina, 797 F.2d 1109, 1111 (1st Cir. 1986). Under Texas law, an instrument, such as the check in question, "which does not purport to designate a specific payee" is a "bearer" instrument. Tex. Bus. & Com. Code Ann. § 3.111(3) (Vernon 1968). Bearer paper may be negotiated by delivery alone and endorsement is not necessary. Tex. Bus. & Com. Code Ann. § 3.202(a) (Vernon 1968). Regalado, as the holder of such an instrument, or anyone else that obtained possession of it, could transfer or negotiate the check, and enforce payment in his own name. Tex. Bus. & Com. Code Ann. § 3.301; Jackson T. Fulgham Co. v. Stewart Title Guaranty Co., 649 S.W.2d 128 (Tex. Ct. App. 1983). The statute does not provide an exception for monetary instruments which the original maker did not intend (but did not objectively indicate by written restriction) to be cashed because of insufficient funds. Introducing such subjective factors would not only confound the commercial law but also render the reporting statute ineffective.

With regard to Regalado's contention that, even if it was a monetary instrument, the check had no value the proof clearly presented an issue for the jury. Although

it might have accepted Regalado's evidence tending to show the check to be without value, the jury rejected that evidence and found the check to have the requisite value. That finding is sustainable in light of the face amount of the check which was found attached to a bundle of currency, and the inference which can be drawn from these facts.

Second, Regalado argues that there was insufficient evidence for the jury to conclude that he knew he had possession of the check. Regalado testified at trial that he had misplaced the check and did not realize it was in his car when he crossed the border. The record proof disclosed that the check was found in the glove compartment of his car bound with rubber bands to the cash that was there. Determination of the facts of a case, particularly with regard to the credibility of witnesses and the weight given to testimony is within the sole province of the jury. United States v. Davis, 752 F.2d 963, 968 (5th Cir. 1985). A reasonable trier of fact could have found that the evidence established knowledge beyond a reasonable doubt. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc).

II.

Next, Regalado argues that the trial court erroneously instructed the jury that the check was a monetary instrument thereby invading the decision-making province of the jury in violation of United States v. Johnson, 718 F.2d 1317 (5th Cir. 1983) (en banc).

In *Johnson* this court held that whether a document was a "security" within the meaning of a statute was a jury question and that the trial court's instruction that

the document in question was a security was reversible error. However, *Johnson* provides that an instruction to the jury that a particular check is a monetary instrument is permissible where the check is a "generic type of document." *Johnson,* 718 F.2d at 1321 n.13. Because the Benavides check which Regalado possessed was regular in form and appearance, it falls within this exception.

The instant case is different from *Johnson* in two other critical ways. First, the trial court did not instruct the jury here that the check was a monetary instrument as a matter of law. Rather, the contested instruction was:

> About "monetary instruments," I will tell you that it can be currency or can be negotiable instruments, as we have in this case a check. A negotiable instrument under the law can be a check and certainly currency.

This form of instruction did not take the question of whether the check was a monetary instrument out of the decision-making province of the jury. The instructions told the jury that the check *could be* a negotiable instrument which *could be* a "monetary instrument." Regalado's jury was not deprived of the right to decide this check was not a monetary instrument.

Second, Regalado did not object to the jury instruction as given. In *Johnson,* the en banc court expressly reinstated the conviction on Count Two involving an instruction that a telephone call was a "wire signal" as a matter of law because Johnson did not request that the issue be submitted to the jury and did not raise the issue on appeal. 718 F.2d at 1325 n.23. *See also* Fed. R. Crim. P. 30.

III.

Finally, Regalado contends that the court erred by failing to instruct the jury that he should be acquitted if the jury found that he did not believe the check was a negotiable instrument.

In United States v. Granda, 565 F.2d 922 (5th Cir. 1978), this court held that it was plain error for the court not to discuss in its instructions the defendant's ignorance of the law which was at the heart of her denial of the specific intent to commit a reporting act violation. *Granda*, 565 F.2d at 926. Unlike the defendant in *Granda*, Regalado admitted his knowledge of the reporting requirement. Regalado testified that he knew this check was the "type of thing that needs to be declared," and that he would have reported it as a matter of precaution if he knew it was in his possession. Regalado's primary defense was that he did not know the check was in his vehicle. The court instructed the jury that it must decide whether Regalado "knew he had in his possession monetary instruments of more than $10,000."

Hence, the instructions as given by the court adequately protected Regalado. United States v. Natel, 812 F.2d 937, 943 (5th Cir. 1987).

The judgment appealed from is

AFFIRMED.

ATTACHMENT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-6264

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALFREDO LUNA REGALADO,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(OCTOBER 11, 1988)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
United States Circuit Judge

ATTACHMENT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

DOCKET NO. B-87-295-01

UNITED STATES OF AMERICA

v.

ALFREDO LUNA REGALADO
Route 2, Box 168-AR
McAllen, Texas 78501

(Filed December 18, 1987)

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, December 2, 1987, with counsel, J. A. "Tony" Canales, pleading guilty, and the court being satisfied that there is a factual basis for the plea on October 29, 1987.

There being a finding of guilty.

Defendant has been convicted as charged of the offense of transporting currency from Mexico, monetary instruments of a value in excess of $10,000 without reporting said transportation, in violation of Section 5316(a)(1)(B), Title 31, United States Code, on the One Count Indictment.

OFFENSE COMMITTED: July 1, 1987.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custory of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and fined a sum of $2,000.

It is further adjudged that execution of the imprisonment sentence imposed is hereby suspended, and the defendant is placed on probation with supervision for three (3) years.

The Court further orders the following terms and special conditions of probation:

Timely payment of the $2,000 fine, with first payment at $666.66 to be made on or before the 2nd day of June, 1988, and an annual payment of $666.67 thereafter, until the fine is paid in full.

The defendant is further required to notify the United States Attorney, Attention Collection Division, P. O. Box 61129, Houston, Texas 77208, in the event of any change in the name or address of the defendant from what is stated above.

The Court further imposes a $50.00 special monetary assessment pursuant to 18 USC 3013.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

/s/ FILEMON B. VELA
Honorable Filemon B. Vela
U. S. District Judge

APPROVED AS TO FORM:

/s/ Signature Illegible

Date: December 18, 1987.